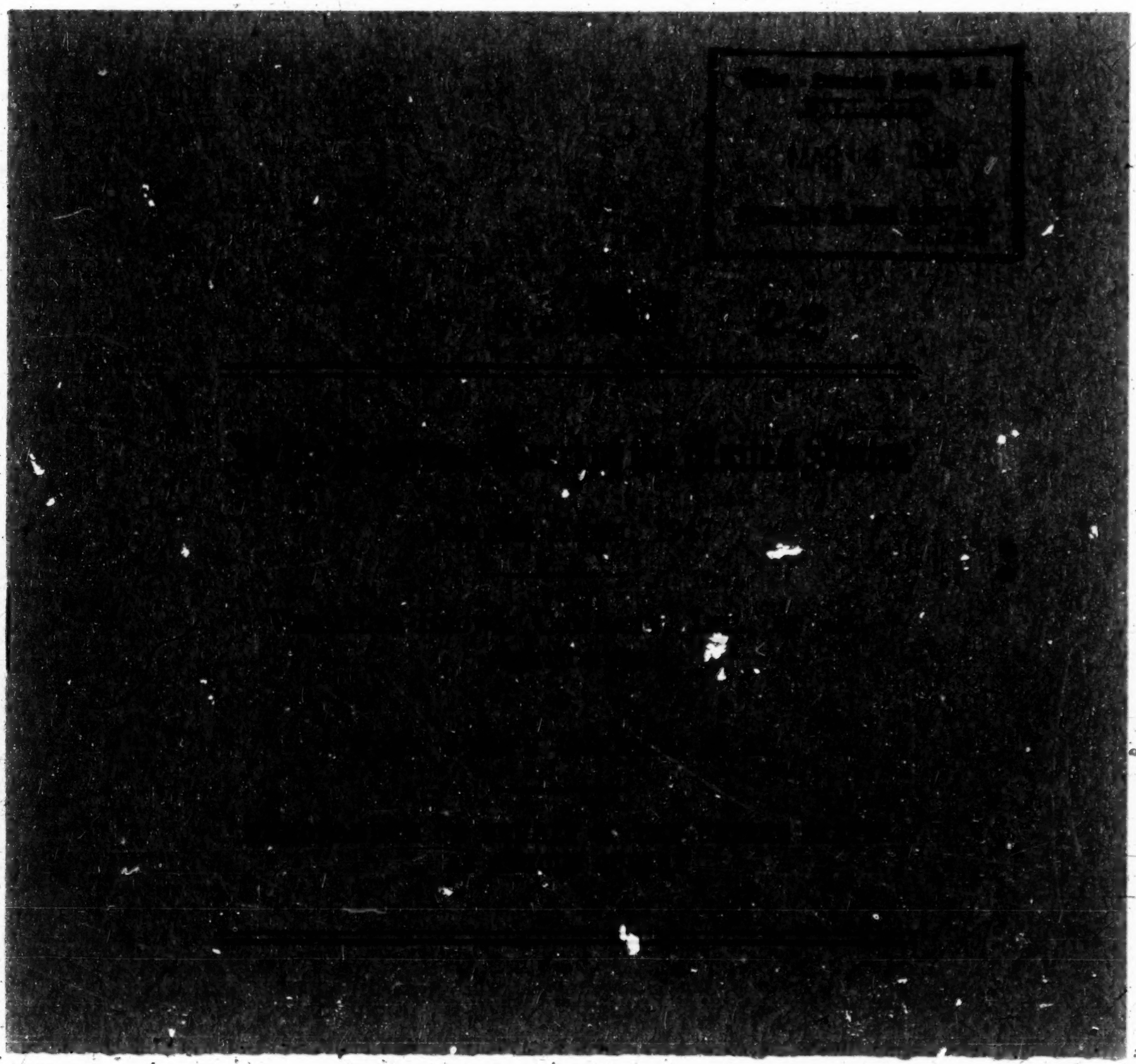

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 608

VERMILYA-BROWN COMPANY, INC., ET AL.,
PETITIONERS

v.

JOHN JOSEPH CONNELL, ET AL.

MEMORANDUM ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

In this suit for overtime compensation brought against a cost-plus contractor with the United States, the Second Circuit Court of Appeals has held that the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 201 *et seq.*, "* * * applies to work done on an Outlying Defense Base in Bermuda obtained by the United States under a 99-year lease and executive agreement with the British Government on March 27, 1941. * * * " Precisely, the court below decided that the interest in a military base, here the Bermuda Base, acquired by the United States from Great Britain under the Leased Bases Agreement of 1941, was such as to constitute such base a "* * * Territory or possession of the

United States * * *" within the meaning of Section 3 (c) of the Fair Labor Standards Act, *supra.* 29 U. S. C. 203 (c).

This case is important both because of the large amount of overseas construction presently being prosecuted in military bases acquired under agreements the same as or extremely close to the agreement here involved, and because of the possible affect upon our foreign relations of the holding that the leased bases are "possessions" of the United States. In view of the factor last mentioned, this Department requested the views of the Department of State. The State Department, in a letter attached hereto as an appendix, has concluded that "The rights and privileges given to the U. S. by the Leased Bases Agreement of March 27, 1941, as well as the restrictions placed on the U. S. by the Agreement are regarded by the Department as the conditions of use and occupancy of the leased areas and do not seem to it to indicate that such areas are possessions of the United States.", and that it "* * * regards as unfortunate the conclusion of the Court that the U. S. exercises as complete control in the leased areas as in other areas long known as 'possessions' of the U. S., * * *." That Department further states that the holding of the Second Circuit Court of Appeals herein "* * * would not in the Department's view be calculated to improve our relations with that Government [Great Britain]

* * *" and "* * * might very well be detrimental to our relations with other foreign countries in which military bases are now held or in which they might in the future be sought. * * *"

The position of the State Department on a matter of this sort is entitled to the highest weight.

Accordingly, because of the importance of the question presented and the difference between the decision below and the views of the State Department, we urge that the petition for certiorari be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH, 1948.

APPENDIX

DEPARTMENT OF STATE,
Washington, January 30, 1948.

[In reply refer to LE/M]

The Hon. TOM CLARK,
Attorney General.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to Mr. Peyton Ford's letter of January 2, 1948, calling attention to the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *John Joseph Connell et al.* v. *Vermilya-Brown Company, Inc., et al.* in which it was held that the defense bases in Bermuda are possessions of the United States within the meaning of the Fair Labor Standards Act of 1938. A copy of the opinion was enclosed and an expression of the Department's views concerning the correctness and desirability of the holding were requested in view of the possible implications of the decision from the standpoint of the international relations of the United States.

In arriving at its decision the Court pointed out that under the Leased Bases Agreement of March 27, 1941, the United States is given broad authority within the leased areas appropriate for their control and defense and added that:

> Other provisions also serve to show the nature of the grant. Thus the United States is given the "absolute right" to assume and exercise jurisdiction of all of-

fenses within a leased area, by a British subject "apprehended therein," and by any other person, without restriction, with provision for surrender of offenders to the appropriate authority of the Territory if the United States so elects, Art. IV (1, 2), and for surrender of offenders to the United States authorities where they are within the Territory, but outside the leased areas, Art. VIII. The immigration laws of the territory adjacent to the bases do not apply to the leased areas, Art. XIII. United States postal facilities are to be established in the leased areas, Art. XVI. No person in the leased areas serving or employed there can be subject to income tax or poll tax of the territory adjacent to the bases, Art. XVII. The leased areas are to revert to the "Lessor" only when abandoned by the United States with "notice" of such abandonment, Art. XXI. And Art. XXIV, significantly entitled "Possession," provides: "On the signing of this Agreement, leases of the Leased Areas, substantially in the forms respectively set out in Annex II hereto, shall be forthwith executed, and all rights, power, authority and control under such leases and under this Agreement (including transfer of posession where it shall not previously have been transferred) shall thereupon become effective immediately, and pending execution of such Leases they may be exercised *ad interim* and possession of the Leased Areas shall be immediately given so far as the location thereof is then ascertained. Where the precise location of a portion of any Leased Area is not ascertainable until more detailed descriptions are available, possession of such

portion shall be given as rapidly as possible." 55 Stat. Pt. 2, 1569.

The Agreement does not specifically declare the leased areas to be part of the territory of the United States. It does contain, however, the following interesting negative provision: "It is understood that a Leased Area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas." Art. XI (4), 55 Stat. Pt. 2, 1565.

The cumulative effect of these various provisions compels the conclusion that the areas are subject to fully as complete control by the United States as obtains in other areas long known as "possessions" of the United States.

Under Art. IV (1) the United States does not have "the absolute right" of jurisdiction over the offenses enumerated therein but only the absolute right "in the first instance" to assume and exercise jurisdiction with respect to such offenses. The jurisdiction over offenses conferred on the United States by Art. IV is a limited jurisdiction, and is not confined to the leased areas but in some aspects extends also to the whole Territory in which the base is situated. During the war the U. S. has been granted *exclusive* jurisdiction over offenses committed by members of its armed forces stationed in many foreign countries; likewise exemptions from immigration laws, permission to establish postal facilities, exemption from income and other taxes, have been or are enjoyed by members of the

armed forces of the United States and other governmental personnel in many foreign countries without any suggestion that by the grant of such rights and privileges the foreign sovereign concerned has surrendered its sovereignty or bargained away its possessions. The rights and privileges given to the U. S. by the Leased Bases Agreement of March 27, 1941, as well as the restrictions placed on the U. S. by the Agreement are regarded by the Department as the conditions of use and occupancy of the leased areas and do not seem to it to indicate that such areas are possessions of the United States.

The Department regards as unfortunate the conclusion of the Court that the U. S. exercises as complete control in the leased areas as in other areas long known as "possessions" of the U. S., and its specific reference in this connection to the Philippine Islands, Swains Island, Samoa, Guam and the guano islands over all of which the U. S. exercises sovereignty, except the Philippines over which sovereignty was exercised until they were given their independence on July 4, 1946, and except the guano islands, over which, in general, the U. S. exercises exclusive jurisdiction and no other nation claims sovereignty.

Any holding that the bases obtained from the Government of Great Britain on 99 year leases are "possessions" of the United States in a political sense would not in the Department's view be calculated to improve our relations with that Government. Moreover, such a holding might very well be detrimental to our relations with other foreign countries in which military bases

are now held or in which they might in the future be sought. The Department is not clear that the Court has so decided in the case under reference, but it feels that the matter is not free from doubt and in view of the possible implications that it should not be left in that state.

The arrangements under which the leased bases were acquired from Great Britain did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States. The leased areas are to be held by the United States for the stated period for certain specified uses of a military nature; and the United States is not free to use them as it would its own property. This is evident from certain provisions of the Agreement of March 27, 1941. For instance, businesses cannot be established or professions practiced in the leased areas (Art. XVIII), nor can wireless stations be established or submarine cables landed except for military purposes (Art. XV), without the consent of the government of the Territory concerned, and commercial aircraft cannot operate from the bases without the consent of the Government of the United Kingdom (Art. XI). Furthermore, the United States cannot assign or underlet or part with the possession of the whole or any part of any leased area, or of any right, power or authority granted by the leases or the Agreement (Art. XXIII). The restrictions placed on use of the bases by the United States and the term of the lease are inconsistent with the conception of "possessions" of the United States as applied to the areas mentioned in the Court's opinion.

It may be of interest in connection with the foregoing to point out that the Act approved March 27, 1942 (56 Stat. 176), affords protection through the War Damage Corporation to property "situated in the United States (including the several states and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States."

The Legislative history of the bill shows that during the debate in the House on March 2, 1942, Mr. Springer inquired what places were included in the final phrase "in such other places, etc." Mr. Dewey replied:

> As I recall—and I can be corrected by my colleagues if I don't state it correctly—that referred to Navy bases and Army bases under the control and jurisdiction of the United States wherein there may be private property connected with them.

None of Mr. Dewey's colleagues did in fact correct this statement in any way. (Congressional Record, Proceedings and Debates of the 77th Congress, Second Session (Paper Edition, temporary paging), 1907.)

It would therefore appear that Congress considered this phrase necessary in order to extend coverage under the War Damage Act to the leased bases, even though the phrase "territories and possessions" was also used.

It is hoped that the above views will be of assistance to the Attorney General in determin-

ing what further action should be taken with respect to the case under consideration.

Sincerely yours,

[s] Ernest A. Gross,
ERNEST A. GROSS,
The Legal Adviser.
(For the Secretary of State.)

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